

Franchise

In examining the structure of the Energy Efficiency Utility ("EEU"), the Public Service Board ("Board") noted that one potential alternate structure for the EEU would be a franchise model. At the August 9, 2007, workshop in this process, there was some discussion regarding the definition of the term franchise. Below is some brief background on the definition, creation, and characteristics of franchises as they relate to utility service regulated by the Board. This is not an attempt to provide a comprehensive or definitive answer to the question of how to define the term "franchise." Rather, it is intended to provide a starting point for such a discussion.

Definition

The Vermont Supreme Court has described the concept of a franchise as follows:

A franchise is a right or privilege conferred by the state to a grantee for the provision of some public purpose. A grant of franchise conveys a property interest that is subject to due process protections. Because of its public purpose, any ambiguity regarding the nature of the grant must be construed strictly against the grantee.¹

Black's Law Dictionary provides a similar definition of the term "special franchise:" "a right conferred by the government, esp. to a public utility, to use property for a public use but for private profit."

The Court addressed only the Board's ability to grant franchises. There are other examples of entities that have been granted specific privileges for public purposes by the Vermont legislature. These include the Vermont Public Power Supply Authority ("VPPSA"), the Enhanced 911 Board, and the Vermont Hydro-Electric Power Authority.²

Essentially, the definition of franchise is relatively broad and the method of creation and the power granted to the new entity are the more important considerations.

Creation of Franchises

With respect to the authority of the Public Service Board ("Board") to grant franchises, the Court stated:

The Vermont Legislature has given the PSB statutory authority to grant a franchise, in the form of a "certificate of public good," but only after a period of

¹*Petition of Vermont Electric Power Producers, Inc.*, 165 Vt. 282, 289-290 (citations omitted).

²In the *Description of Some Structural Models* prepared by the Board and attached to the Board's July 13, 2007, memorandum, this type of structure was referred to as a "Joint Action Agency," with VPPSA cited as an example of this type of model. Due to the structural differences between an entity such as VPPSA and entities that receive a certificate of public good from the Board, it would likely be useful to maintain a distinction between the franchise model and the joint action agency model.

public notice and an opportunity for public hearing to determine whether the award of such a franchise promotes the good of the state. . . . The requirement that a franchise be awarded pursuant to public notice and public hearing ensures that the property right thus created serves the public good.

As noted by the Supreme Court, the issuance of a certificate of public good pursuant to 30 V.S.A. § 231 creates a franchise for a "person, partnership, unincorporated association, or previously incorporated association, which desires to own or operate a business over which the public service board has jurisdiction under the provisions of this chapter. . . ." Section 231 sets out a procedure for the Department of Public Service ("Department") to comment on petitions for certificates of public good and for the Department to request a hearing on the petition and also allows the Board to set such a hearing if it feels it would be appropriate.

Section 102 of Title 30 also provides for the issuance of a certificate of public good for business incorporated in Vermont for the purpose of providing utility service.

In addition to reviewing the Board's role in the creation of electric utilities, it would be useful to briefly examine the Board's role in the creation of cable television system franchises. Chapter 13 of Title 30 sets out the Board's authority over cable television systems,³ including the procedure for obtaining, and revoking, a certificate of public good for such a system. Pursuant to 30 V.S.A. § 502(b) the Board "shall be the franchising authority in the state empowered to grant, renew and revoke certificates of public good for all cable television systems and shall have all other authority to regulate cable television systems." Under this process, cable television systems petition the Board for a certificate of public good and, after opportunity for hearing, the Board will rule on the petition. If a certificate of public good is granted, it will lay out the rights and obligations of the system, including any appropriate conditions. Certificates of public good issued under Chapter 13 have 11 year terms pursuant to statute.

Chapters 79 and 81 of Title 30 set forth the powers of municipal and cooperative electric utilities and provide for the establishment of these entities.

Characteristics of franchised utilities

Certain characteristics are common to most public utilities regulated by the Board. These include: an obligation to serve, a defined service area, an obligation to file tariffs with the Board, the requirement that financing and sale of assets are subject to Board approval, the power of eminent domain, and the obligation to pay a gross receipts tax. However, there are some differences among the regulated utilities; most notable is the Board's more limited authority over cable television systems due to federal preemption in this area.

³The Board's jurisdiction over cable television systems is limited due to federal preemption.